IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 6860 of 2006

Shri Rab Yakub Tamboli ..Petitioner

vs.

Shri Aziz Yakub Tamboli ..Respondent

Ms.Anulata Saundankar for petitioner
Mr.P.K.Deshmukh for respondent nos.1 to 4.

CORAM: S.C.DHARMADHIARI J.
5th December,2007

P.C.

1. Heard the learned Advocates. Pderused the petition and annexures thereto. The petitioner who is original defendant in Reg.Civil Suit No.24 of 1999 applied vide Exh.13 for stay of that suit on the ground that he had instituted Reg.Civil Suit No.107 of 1998 which is earlier in point of time and pending in the Court of Civil Judge, Sr.Dn., at Alibag.

2. That application having been rejected the present petition is filed.

3. Notice was issued by this Court and I have heard the original plaintiff in Reg.Civil Suit No.24 of 1999.

4. The submission of the learned Advocate

appearing for the petitioner is that all ingredients of section 10 have been complied with. She submits that the object and purpose of section 10 has been once again high lighted in the latest decision of the Supreme Court reported in (2005) 2 Supreme Court Cases 256 (National Institute of Mental Health and Neuro Sciences Vs.C.Parameshwara). She submits that even the properties are identical. In such circumstances, the Court below was in error in holding that the reliefs sought are different and parties are not identical. The order suffers from patent illegalities and deserves to be quashed and set aside.

5. On the other hand, the learned Advocate appearing for the respondents supported the impugned order.

6. With the able assistance of the learned Advocate appearing for both sides, I have perused the plaint in Reg.Civil Suit No.24 of 1999. That is admittedly instituted by the respondents only against petitioner no.3 who is plaintiff no.3 in Reg.Civil suit no.107 of 1998 (earlier suit). The relief in Reg.Civil Suit No.107 of 1998 is that the property in paras 4 and 5 of the plaint be partitioned and the

plaintiff be put in possession of their 1/7th share. There is a declaration claimed that the sale deed executed by original defendant nos.5 and 6 to that suit on 21st August, 1997 is illegal and not binding on the plaintiffs. There are further reliefs claimed as well.

7. In so far as the later suit is concerned that is instituted only with regard to Municipal house no.10/29 in CTS No.436 and request of the respondent is that it be declared that he is entitled to possession of the property from the respondent as he is a mere licensee in respect thereof. The plaint averments proceed on the basis that a portion of the house property was handed over to respondent no.3 who is the original plaintiff no.3 in the earlier suit as a licensee. However, there is a gift deed in respect of the said property in favour of the plaintiffs in the later suit.

8. Having perused the plaint averments and array of parties so also the provisions of section 10, I am satisfied that the learned Judge was in no error in rejecting the application. This is not a case where as observed by the Supreme Court the ingredients are satisfied. In fact, the very decision

relied upon by the learned Counsel appearing for the petitioner would demonstrate that section 10 applies only in cases where whole of the subject matter in both suits is identical. There has to be identity of the matter in issue in both suits. Applying this test, it is clear that the subject matter in both suits is not identical. It is merely a portion of one of the house property which is subject matter of the later suit. In such circumstances, merely because the plaintiff no.3 in the earlier suit is defendant to the later suit does not mean that the later suit needs to be stayed. The order under challenge does not suffer from any illegality or perversity so as to call for interference under Article 227 of the Constitution of India. Petition is dismissed. At this stage the learned Advocate appearing for the petitioner prays that this Court should issue a direction that both suits be tried together. In my view, it was open for the petitioner to make such an application to the Court below and needless to state that if such application is made it must be dealt with in accordance with law uninfluenced by any observations in this order.

(S.C.DHARMADHIKARI J.)